

FY1999

Office of Hearings and Appeals

ANNUAL REPORT





Message from the Director

This Annual Report for operations of the Office of Hearings and Appeals during fiscal 1999 presents a picture of substantial progress and sound accomplishment. As in other years, our staff successfully handled varied and important work involving many program areas of the Department, and submissions from citizens all over America, both large and small corporations, and states and governmental entities. We take great pride and care in analyzing and deciding these matters and in administering our duties.

Notably, during 1999, regulations conferring upon the office responsibilities for the DOE Contractor Employee Protection Program were finalized. In assuming these responsibilities, OHA took on an inventory of some 70 whistleblower complaints, most of which it has quickly resolved. In others, it has been holding evidentiary hearings where needed. In addition, OHA was asked to handle several very complex and sensitive cases and investigations from which the program areas normally responsible were excluded due to direct involvement. These and other unusual matters were referred to us because our experienced and knowledgeable staff, including veteran hearing officers, has built a reputation for reaching fair, impartial and equitable resolutions.

During the year, I am very pleased to report, the Nuclear Regulatory Commission asked us to assume responsibility for their Personnel Security proceedings. This is recognition of the high regard in which our work is held.

Another step forward this year was OHA's participation for the first time in the Department's annual Energy Excellence Awards program. After 5 years of self-assessments and steady efforts to achieve internal improvement, this seemed to be a natural step. I am very proud to say that the office will receive the coveted "Champion" award.

I would very much appreciate any feedback that you might provide concerning this Annual Report. Feel free to suggest how we might improve our services to you and to the Department. You may call me directly at (202) 426-1566. For general information on how to contact us, please see the Resource guide at the end of the Report or better yet, check our user-friendly website at www.oha.doe.gov. My staff joins me in hoping that you find this Report useful and informative.

Sincerely,

A handwritten signature in dark ink, appearing to read "George B. Breznay".

George B. Breznay

Introduction

The Office of Hearings and Appeals provides a central forum for adjudications at the Department of Energy.* OHA offers a fair, impartial and customer-friendly process in which firms and individuals may seek review of agency actions. The Secretary of Energy has delegated to the OHA Director the authority to act for him in many different areas, and the Director's decision typically serves as final agency action, appealable to the Federal Courts. The responsibilities of the office are diverse. They include, for example, adjudications of matters involving an employee's eligibility for a security clearance, appeals of adverse determinations under the Freedom of Information and Privacy Acts, complaints of reprisals by contractor-employees for "whistleblowing," and requests for exception from DOE orders, rules, and regulations. OHA's decisions are well-written and carefully researched to ensure that they are decided in accordance with the stated objectives of the relevant statutes and regulations. They reflect the careful balancing of important and varied interests, including those of the public, the Department, state governments, and individual litigants. OHA's history of consistently issuing its decisions in compliance with statutory and regulatory deadlines, and its outstanding record of affirmances on judicial review, reflect very favorably on the quality of OHA's adjudicatory process.

For reference purposes, the areas of OHA's formal jurisdiction in the order in which they appear in this Report are:

- * Personnel Security Clearances
- * Whistleblower Protection Program
- * Freedom of Information and Privacy Acts
- * Exception and Special Redress
- * The Oil Overcharge Refund Program
- * Payments-Equal-to-Taxes Provisions of the Nuclear Waste Policy Act
- * Nuclear Utility Assessments
- * Uranium and Thorium Processing Site Remediation
- * Alternative Fuel Transportation Program
- * Nuclear Regulatory Commission Personnel Security Clearances

In addition, OHA is known for responding promptly to the changing needs of the Department. Any Departmental program may ask OHA to resolve disputes arising in that program area. OHA also undertakes other tasks upon request, such as investigating claims of discrimination within the Department, and it chairs the Working Capital Fund dispute resolution council and a similar panel for the procurement office.

The key to OHA's ability to respond to and adjudicate a wide variety of matters lies with the diversity of its staff and the flexibility of its processes. In addition to attorneys, OHA's staff of 41 includes accountants, financial analysts, economists, business administrators, information technologists and even a pharmacist. This small but resourceful staff has repeatedly shown its mastery of complex and difficult issues in many subject areas while maintaining the highest degree of professionalism and decorum. Moreover, OHA's procedures are flexible and easily adaptable to new situations, which allows it to minimize "start-up" time, and quickly to produce high quality work in new areas. To complete this picture of flexibility and adaptability, OHA encourages the use of alternative dispute resolution techniques when they can benefit the parties.

* This Report does not cover the activities of the Board of Contract Appeals, an independent board that adjudicates contract-related disputes pursuant to the Contract Disputes Act of 1978. It also considers other matters in its roles as the Contract Adjustment Board, Invention Licensing Appeals Board, Financial Assistance Appeals Board, and Patent Compensation Board.

OHA's Jurisdiction

As DOE's central adjudicative office, OHA conducts adjudications in a wide variety of subject areas. OHA adapts its procedures to meet the requirements of the particular type of case. For example, security clearance and whistleblower proceedings usually require a full trial-type hearing. OHA decides other matters based solely upon written submissions.

Personnel Security Clearances

Government regulations provide that only the most trustworthy individuals can receive security clearances. OHA plays a vital role in fairly resolving questions concerning an employee's eligibility to hold a security clearance. When questions concerning whether an employee is qualified for a clearance cannot be resolved favorably based upon an investigation, that employee may request a hearing before an OHA Hearing Officer. These hearings permit the employee and DOE to submit additional documentary evidence and present lay and expert testimony under oath. A Hearing Officer is presented with compelling human issues, ranging from substance abuse to mental disorders to financial irresponsibility. The Hearing Officer issues a detailed decision that analyzes the evidence and renders an opinion to the Director of DOE's Office of Security Affairs as to whether the individual should receive or retain a security clearance. In doing so, the Hearing Officer must balance the interests of individuals in keeping security clearances (upon which their jobs usually depend) against the national interest in limiting classified access only to the most trustworthy employees. This process is intended to assure that only reliable persons have access to classified information. Hearing Officer opinions may be appealed to the Director of OHA.

Since 1994, OHA has received 302 requests for Personnel Security Hearings, 69 of them in FY 1999. In over 99% of these cases, OHA Hearing Officers have issued their decisions to the respondents within 30 days after closing the record in the case. The Director of OHA has also issued 60 decisions resolving appeals of the Hearing Officer determinations, 13 in FY 1999. Over 98% of these appeal decisions have been issued on a timely basis.

Whistleblower Protection Program

As part of Energy Secretary Peña's December 22, 1997 Openness Initiative, the Secretary proposed procedures streamlined to protect whistleblowers, and set in motion a process that continued in FY 1999 with the publication of new rules protecting DOE contractor employees from reprisal. These new rules consolidate within OHA the responsibilities for conducting investigations and hearings, and for issuing final agency decisions on whistleblower complaints.

Under the DOE Contractor Employee Protection Program, DOE contractors are prohibited from discriminating against any employee who makes a disclosure to a superior or government official regarding a violation of law, danger to public health and safety, fraud, mismanagement or refuses to participate in an illegal act (a whistleblower). Contractor employees who believe that they have experienced reprisals because of such activities may file a

"I am committed to . . . a work environment for both Federal and Contractor employees that fosters free and open expression of safety concerns. Workers must have no fear of reprisals or retaliation."

— Secretary Bill Richardson
October 1, 1998

"Whistleblowers often shine a powerful light on possible misconduct and we need that kind of self-criticism if openness is to succeed. We will also streamline how we deal with whistleblower allegations, whether it is a health and safety violation, fraud, waste, or dangerous working conditions."

— Secretary Federico Peña,
Openness Initiative
December 22, 1997

"I am committed to a policy of zero tolerance for reprisals against our workers throughout the department's complex . . . As part of this policy, I want to see if there is a practical way to right past wrongs against some of our workers. Looking to the future, we have important environmental cleanup, national security and research missions that must be effectively and efficiently discharged. Maintaining a climate that allows for concerns to be raised without retaliation is critical to this task."

—Secretary Hazel R. O'Leary
March 26, 1996

whistleblower complaint with DOE. After a member of OHA's staff investigates the complaint and issues a report, the employee or the contractor may proceed to an administrative hearing before an OHA Hearing Officer. In whistleblower proceedings, OHA takes into careful account the public interest in ensuring that the Department promotes an atmosphere in which employees may raise important health and safety concerns without fear of retaliation. At the same time, OHA must ensure that DOE's contractors can manage their operations efficiently. These proceedings can be extremely complex and time consuming. Initially, they may require extensive on-site investigation by OHA staff. At the pre-hearing phase, the Hearing Officer is commonly called upon to rule on a number of preliminary matters, such as motions to dismiss a complaint or to order the appearance of witnesses or production of documents. The hearing may involve the testimony of scores of witnesses and hundreds or thousands of pages of documentary evidence and post-hearing submissions. Following the hearing, the Hearing Officer considers all the evidence and issues a detailed written determination regarding the merits of the employee's claim. The Hearing Officer can award a whistleblower such remedies as reinstatement, back pay and attorney's fees. The decision of the Hearing Officer becomes the final decision of the agency, unless it is appealed to the OHA Director.

As expected, OHA's whistleblower caseload increased substantially in FY 1999, due to the responsibilities entrusted to it under the new regulations. During the fiscal year, the Office received 32 complaints for investigation, 38 cases for hearing, and 4 appeals. In the same time period, OHA issued 15 reports of investigation, 10 initial agency decisions, and 1 appeal decision. The average period from assignment of a case to an investigator to the issuance of a report of investigation has been approximately 62 days, and the average period from receipt of a case by a Hearing Officer to the issuance of a written decision has been about 102 days. OHA's record in issuing written Hearing Officers' Decisions in whistleblower cases within the regulatory time period is excellent, as its Hearing Officers have always issued their decisions within the time period specified in the regulations.

Freedom of Information and Privacy Acts

Under the Freedom of Information Act (FOIA), the public has the right to obtain government information unless the requested documents fall within one of the exemptions that allow a federal agency to withhold documents at its discretion. The Privacy Act grants individuals access to certain information that pertains to them. OHA has jurisdiction to review DOE program office determinations that withhold documents that have been requested pursuant to either the FOIA or the Privacy Act.

In cases arising under the FOIA and the Privacy Act, OHA considers appeals from initial agency determinations and issues the final DOE decision. OHA conducts an expeditious yet thorough investigation to verify whether the DOE office properly applied the FOIA or Privacy Act. Thus, OHA serves DOE and the public by ensuring that DOE offices stay abreast of recent developments in the FOIA and Privacy Act and apply these laws consistently throughout the vast DOE complex.

OHA performs its responsibilities in these area through a team approach. Since its creation in 1995, the FOIA Team has been an unqualified success. The team approach creates synergy by encouraging members to share information and engage in cooperative problem solving. The Team Leader, an acknowledged expert, schedules regular Team meetings to discuss recent developments in FOIA law. He maintains up-to-date reference materials and provides information concerning training opportunities. Moreover, the FOIA Team reviews each proposed decision for quality and consistency. Beyond these formal interactions, the FOIA Team engages in brainstorming sessions throughout the adjudicative process. OHA Director George Breznay has consistently supported the team effort approach and believes it enhances the quality of decision-making in this important area.

During FY 1999, OHA resolved 85 FOIA and Privacy Act Appeals. OHA adheres to the regulatory deadline of issuing a decision to the appellant within 20 working days of its receipt of the appeal.

Exception and Special Redress

Any DOE program may include a provision in its regulations that permits regulated parties to apply to OHA for an exception from a DOE rule, regulation or order, or to petition OHA for special redress. Examples of such programs are the Energy Information Administration's various price and sales data collection programs and the Alternative Fuel Transportation Program, under which certain large companies convert portions of their motor vehicle fleets to vehicles that operate on non-traditional fuels. Exceptions and special redress allow DOE programs to be administered in a customer-friendly, flexible manner that takes into account a firm's or individual's unique circumstances and hardship situations. OHA issues decisions on Applications for Exception and Petitions for Special Redress after consultation with the affected DOE program. OHA grants exceptions only when the applicant shows that the generally applicable rule would cause it a serious hardship or gross inequity or would cause an unfair distribution of burdens. Exceptions may be granted, for example, when applying a rule to a specific firm would be inconsistent with the purposes of the program or would impose a burden on the firm that would be grossly disproportionate to the benefit of requiring strict adherence to the rule.

In FY 1999, OHA considered nine requests for exception from Energy Information Administration mandatory reporting requirements. In addition, it is currently considering one Petition for Special Redress, which entails determining whether a state's proposed use of oil overcharge refund monies, previously distributed by OHA, is consistent with the purposes of the refund program.

The Oil Overcharge Refund Program

Through DOE's enforcement efforts, including remedial orders OHA has issued requiring refunds, the Department has collected nearly \$5 billion from firms in the petroleum industry as restitution for pricing violations during the period of price controls. In the last phase of this program, OHA distributes these funds to farmers,

businesses, school districts, state and local governments, and other overcharged persons and business entities. The OHA-administered refund program is the largest of its kind in the federal government. Funds remaining after OHA payments are made to the persons and firms identified as being actually injured are released to DOE energy conservation programs, or are distributed to state and federal governments as a means of providing indirect restitution.

To date, OHA has resolved more than 234,000 refund claims. Only 1,100 claims remain to be decided. Although OHA continues to receive new refund claims, we are taking steps to enable completion of the refund program. We have issued a notice, published in the Federal Register, announcing the deadline of January 31, 2000, for the filing of supplemental Crude Oil Refund Applications. This deadline is a necessary step to expedite closure of the Subpart V Crude Oil Refund Proceeding, which is the largest of OHA's refund proceedings. In addition to the Federal Register notice, OHA mailed out more than 9400 letters to eligible refund applicants to inform them of the deadline and to assist in the filing of their supplemental claims. OHA has received 2,232 supplemental Crude Oil Refund Applications and issued \$730,141 in supplemental refunds to 1,780 applicants in FY 1999.

During FY99 OHA has also assisted the Office of General Counsel to expedite its filing of the remaining Petitions to Implement Special Refund Procedures under Subpart V. Once OHA receives these petitions, we will be able to complete our goal of closure of the refund program.

In furtherance of amendments to the Petroleum Overcharge, Distribution and Restitution Act of 1986, OHA has been instrumental in providing \$64 million of the refund monies to fund energy efficiency programs of the DOE Office of Energy Efficiency, such as weatherization, solar energy utilization and wind energy generation.

As the chart indicates, OHA has distributed more than \$4.7 billion through its refund program.

REFUND PROGRAM DISTRIBUTION		
	FY 1999	Program to Date
Direct Restitution to Applicants	\$8,600,439	\$1,140,189,582
Indirect Restitution Paid to States	\$24,150,000	\$1,153,755,806
Indirect Restitution Paid to U.S. Treasury	\$37,184,573	\$1,409,305,431
Paid to DOE Energy Conservation Programs	\$64,000,000	\$532,251,302
Other	\$0	\$480,233,632
Total	\$133,935,012	\$4,715,735,753

Miscellaneous Cases

OHA also adjudicates a number of other types of cases. Although few in number they tend to be extremely time-consuming and may involve many months of work for teams of attorneys. Some examples follow.

Payments-Equal-to-Taxes Provisions of the Nuclear Waste Policy Act

OHA resolves disputes between DOE and counties or states that contain candidate sites for a high-level nuclear waste repository. These disputes concern payments they are entitled to receive under the Nuclear Waste Policy Act. Those payments represent the amount that the entity would receive if it were authorized to tax DOE activities at the site.

Nuclear Utility Assessments

OHA considers appeals by domestic utilities of their assessments to a fund established to defray the costs associated with the decontamination and decommissioning of DOE's uranium enrichment facilities.

Uranium and Thorium Processing Site Remediation

OHA resolves appeals by uranium and thorium processing licensees of the amount a licensee is to receive under the Energy Policy Act of 1992 to reimburse it for the cost of remedial actions at active uranium and thorium processing sites.

Alternative Fuel Transportation Program

The Alternative Fuel Transportation Program requires that most State governments and certain firms in the energy industry, such as electric utilities, include alternative fuel vehicles in their purchases of new light duty vehicles. These purchase requirements increase each year beginning in 1998. Companies and States may appeal to OHA those decisions of the Office of Energy Efficiency and Renewable Energy that deny exemptions from requirements of the program or that assess a penalty.

Nuclear Regulatory Commission Personnel Security Clearances

Pursuant to a Memorandum of Agreement between the Nuclear Regulatory Commission and the Department of Energy for the conduct of NRC Personnel Security Administrative Review hearings and review panels, OHA will provide NRC the service of its hearing officers to preside over these hearings and the administrative review of questions concerning an individual's eligibility for access authorization or employment clearance.

Customer Service

OHA personnel regularly provide a variety of services to DOE internal customers. For example, OHA attorneys assist the DOE's Office of Dispute Resolution as mediators. In Equal Employment Opportunity (EEO) cases where a DOE office has a conflict of interest, OHA attorneys have stepped in to serve as counsel for DOE and as investigators under special authority from the Secretary of Energy. OHA Hearing Officers have served as instructors for the DOE's Nonproliferation and National Security Institute, and the Office's FOIA Team Leader has regularly provided assistance to DOE's FOIA Office in its nationwide training seminars. OHA Hearing Officers have also provided training assistance to field personnel in the Office of Employee Concerns.

OHA prides itself on the service it provides to external customers as well. OHA has long maintained a Public Reference Room where members of the public can read OHA decisions and review the submissions by parties to OHA cases. More recently, OHA created a user-friendly web page to assist the public in understanding and obtaining access to the wide array of functions the office performs. Decisions are made

The Docket Staff

OHA has accomplished its mission, in large part, because of the hard work of the Docket and Publications Division headed by Marcia Carlson. Moreover, the Docket Staff plays a critical role in creating and maintaining the high-quality infrastructure that has enabled OHA to perform its mission. The Docket Staff is responsible for maintaining OHA's filing systems and docket facilities, but these hardworking individuals do much more than receive filings and move paper around. The work of the Docket Staff is at the very heart of OHA. Since OHA opened its doors in 1974, the Docket Staff has designed and implemented the procedures used by OHA to process more than 325,000 cases and to keep the public informed of those processes and OHA decision-making. Every OHA employee, as well as every OHA customer, relies upon the Docket Staff. The efficiency and dependability of the Docket Staff contribute in a major way to OHA's ability to maintain high standards while performing its many complex tasks.

available to the public on the Internet within 24 hours from the time they are issued. As part of its outreach programs, OHA publishes the Federal Energy Guidelines for the Department, a major research tool. Any DOE office may arrange to have materials of public interest published in the Guidelines. OHA has also developed written question-and-answer guides to respond to frequently asked questions about OHA's program areas.

Information Management at OHA

OHA has long recognized the need for an excellent information management system to manage its large number of cases, maintain accurate case data, and provide reliable information to the public. OHA has a first-rate team of computer professionals, as well as state-of-the-art hardware and software. OHA was the first headquarters office to use a local area network (LAN). OHA's investment in a cutting-edge computer-based information management system has produced results. OHA staff members are able to access information immediately concerning more than 250,000 cases, including all pending cases, from their desks, fostering better service to the public.

Serving Our Community

In FY 1999, OHA encouraged its employees to honor the legacy of the Rev. Dr. Martin Luther King, Jr., by making an increased commitment to community service. OHA observed Dr. King's birthday by viewing a powerful video about the types of injustices Dr. King sought to end, and by encouraging increased community service to honor his legacy.

An outgrowth of that observance was an OHA hat and mitten collection for a local elementary school and the decision by six staff members to join the "Everybody Wins!" lunchtime reading program. These OHA staff members, including the Director and a Deputy Director, read to individual first- and second-grade students at DC's Amidon Elementary School, a short walk from OHA's offices at L'Enfant Plaza. We know the students have benefited. OHA employees have also received satisfaction from their participation in this program. After his first day in the program, the Director of OHA had the following to say:

"My student at Amidon is a great youngster! Lively, friendly, and he enjoys reading. He got absorbed in the first book we read, was eager to turn the pages, and even read some himself. I look forward to going back and seeing him again."

In addition to going out into the community, we invited the community to visit us on the 1999 Groundhog Shadow Day. From our 41-person office, we had five mentors, and eight other individuals contributed in various ways. Five visiting students (10% of the 50 who visited DOE Headquarters that day)-- high school juniors from Bell Multicultural School-- were delightful and took full advantage of the opportunity to learn about our office. After individual mentor/student visits, we staged a mock hearing, with students as shadows to the hearing officer and counsel, and other OHA staff members serving as witnesses. After a pizza lunch, the OHA Director met informally with the students in his office. He urged them to consider a career in government.

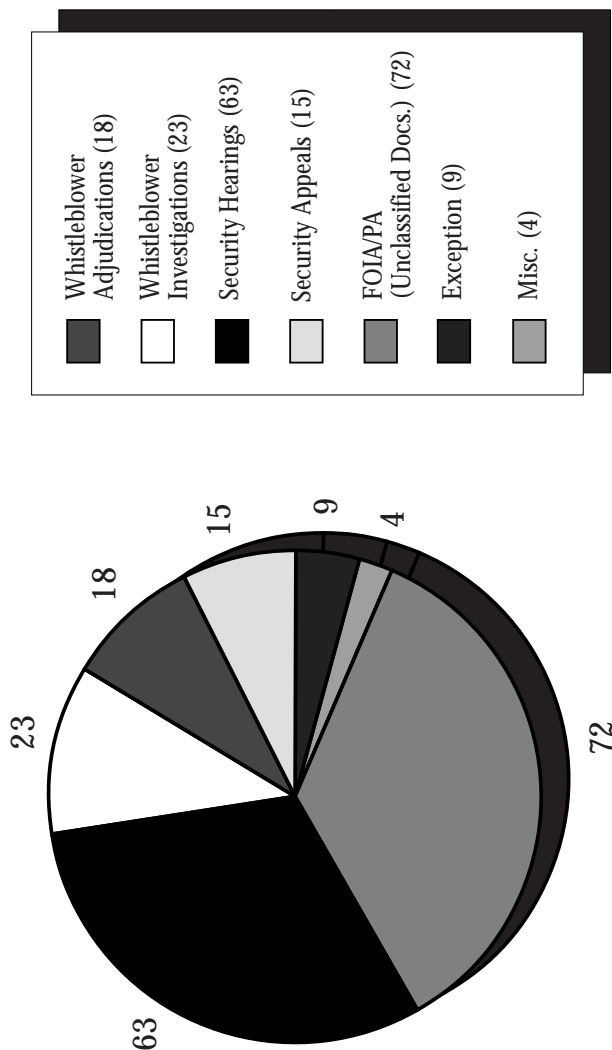
OHA's Mailing Address: Office of Hearings and Appeals
 Department of Energy
 Washington, DC 20585-0107

For general information, contact the Office of the Director at (202) 425-1566.

For information concerning how to file a new case or the status of an existing case, contact the Docket and Publications Division at the above address or telephone (202) 426-1400. For copies of OHA decisions or submissions in OHA proceedings, contact the Public Reference Room at (202) 426-1010. You may also FAX your inquiries to (202) 426-1415 or E-Mail them to marcia.carlson@hq.doe.gov.

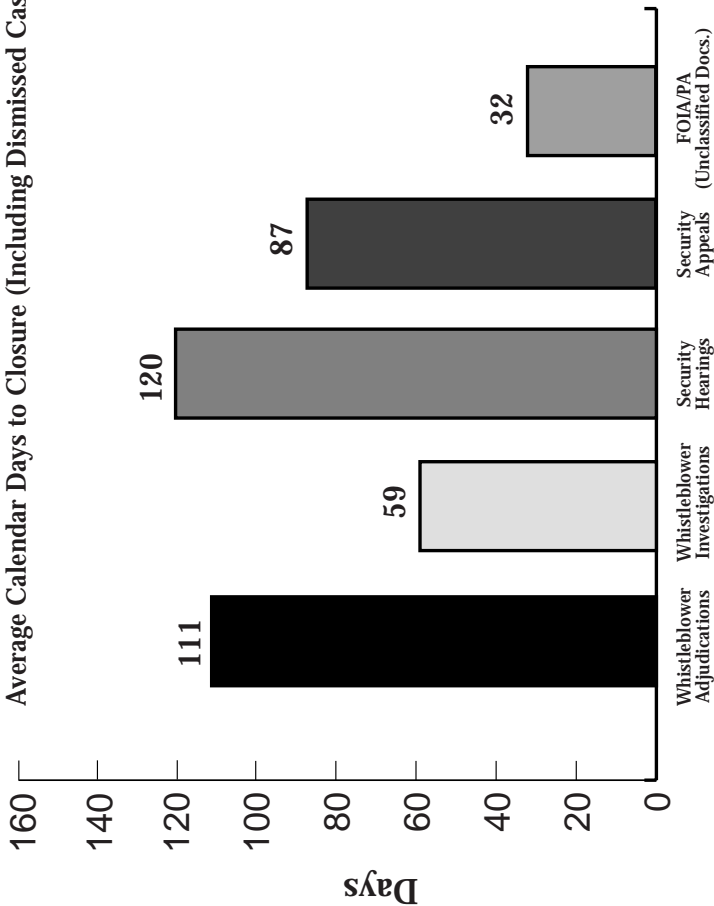
The answers to many questions about OHA can be found on our Home Page at www.oha.doe.gov. OHA's home page includes information about OHA programs the regulations governing OHA proceedings, OHA's Decisions and Orders, and OHA's public databases.

OHA Cases Closed in FY99



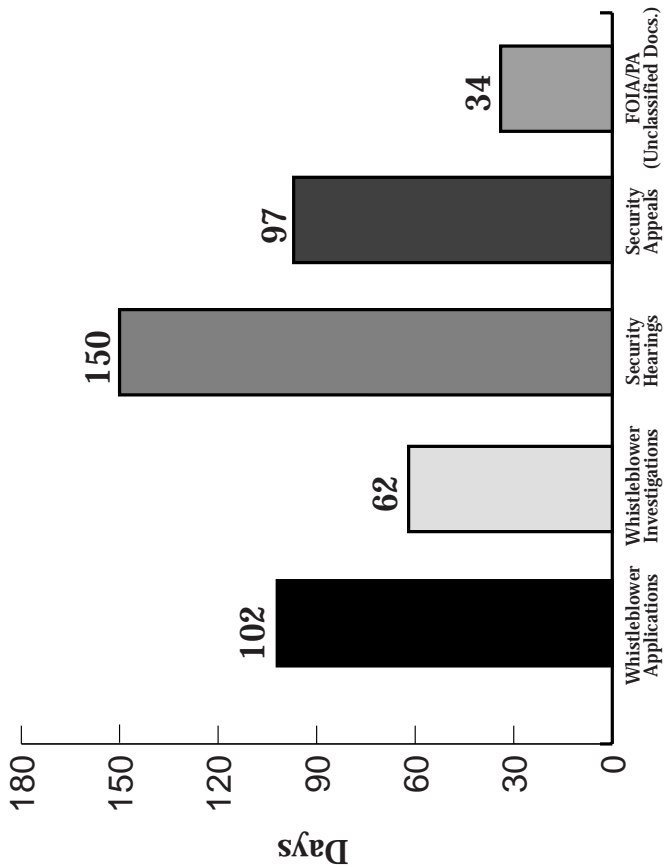
OHA Cases Closed in FY99

Average Calendar Days to Closure (Including Dismissed Cases)



OHA Cases Closed in FY99

Average Calendar Days to Closure (Excluding Dismissed Cases)



Notes